Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)	)))))))))	 WC Docket No. 03-266

REPLY COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION

Focal Communications Corporation ("Focal"), by its undersigned attorneys, files these reply comments in support of the Petition for Forbearance filed by Level 3 Communications LLC ("Level 3") in the above-captioned proceeding.[1]

While Focal does not generate any VoIP traffic itself, Focal offers service to VoIP providers. In order to purchase this service from Focal, VoIP providers are first required to warrant that the VoIP traffic being handed off to Focal is exempt from access charges under the Commission's rules. Focal receives VoIP traffic in the usual TDM protocol used by the Public Switched Network, and proceeds to deliver it within the same LATA. All signaling information received on such traffic is left unchanged by Focal. Where the terminating end user is served by a LEC other than Focal (either an incumbent LEC or a CLEC), Focal pays reciprocal compensation to the LEC that completes the call.

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1 *See Pleading Cycle Established for Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications*, Public Notice, WC Docket No. 03-266, (rel. Jan. 2, 2004).

In the event the Commission were not only to deny the Level 3 Forbearance Petition, but also hold that access charges should have been paid on phone-to-phone IP telephony calls, Focal respectfully requests that such a holding should expressly exclude the termination service provided to the VoIP industry by Focal. An exclusion is warranted for at least two reasons. First, a CLEC that receives from a call from a VoIP provider in TDM protocol and then terminates that call within the same LATA cannot, in any event, be liable for any interstate access charges the Commission may decide to impose. Interstate access charges are owed by interexchange carriers, not by access providers. Consequently, if the Commission were to determine that access charges should have been paid on phone-to-phone IP traffic, the IXC carrying that traffic -- *i.e.,* the VoIP provider and any other upstream long distance carriers involved in those calls -- would be liable for such charges to the CLEC, as well as to any other LEC involved in terminating the traffic, in which case the two LECs would be jointly providing exchange access to the VoIP provider.

In support of Focal's position, attached are the cover page and pages 8-9 of a September 2, 1999, brief in E-99-22 in which Bell Atlantic agrees with Focal's position. "For more than 15 years the Commission has treated *every* jointly provided interstate access service the same way: it has ruled that local exchange carriers must share access revenue received from the interstate carrier but may not demand other forms of payment *from each other*." (emphasis in the original).

Second, Focal has already taken the only reasonable step available to it in order to insure that it terminates only traffic exempt from access charges. For example, Focal has no way of examining VoIP traffic to determine whether it may have originated on a computer, or whether an enhanced service was performed upsteam. Nor would it be physically possible for Focal to attempt a constant 24 hour, 365 day, surveillance of the upstream environment of all VoIP traffic it receives. Given that the Commission's ESP exemption entitles enhanced service providers to obtain local service from local exchange carriers, Focal is clearly entitled to serve these entities. The express warranty that Focal requires from its VoIP customers is the best and perhaps only way that LECs can serve ESPs as contemplated by the Commission's exemption.

In the future, if the Commission deems it appropriate to prospectively apply some charge to these calls other than the reciprocal compensation rates presently paid, the industry would need to develop some method of flagging these calls, which currently are not distinguishable to downstream carriers from non-VoIP calls. Such a flagging approach might also identify the ESP involved using a signaling field that is not presently employed.

Respectfully submitted,

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Dated: March 31, 2004

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Washington, D.C.

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Enforcement Division

In the Matter of	)	
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Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.	)	
	)	
Complainants,	)	
	)	
	)	File No. E-99-22
	)	
Global NAPs, Inc.	)	
	)	
Defendant.	)	

BELL ATLANTIC'S BRIEF ON NON-COST ISSUES

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September 2, 1999

incumbent carriers have access tariffs in place covering such shared access arrangements. Those tariffs require the competing carriers to pay the incumbents a portion of the revenue received from the interexchange service provider – here, the ISP – to cover a portion of the incumbent's cost of originating the access traffic.

B. Joint Provision of Access Services. For more than 15 years, the Commission has treated *every* jointly provided interstate access service the same way: it has ruled that local exchange carriers must share access revenue received from the interstate carrier but may not demand other forms of payment *from each other*. *See, e.g.*, *Reciprocal Compensation Order* ¶ 9 ("When two carriers jointly provide interstate access . . ., the carriers will share access revenues received from the interstate service provider"); *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 7183, ¶¶ 22-24 (1989); *Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 2 FCC Rcd 4518, ¶¶ 39-40 (1987); *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1176-77 (1984).

As the Commission recognizes, in the case of ISPs, there are generally no per-minute "access charges" to share. *See Reciprocal Compensation Order* at ¶ 9. That is because the Commission specifically exempted ISP traffic from such access charges. *Id.* That exemption does not, however, change the nature of the traffic – it remains "non-local interstate traffic," *id.* at ¶ 26, n.87, that is subject to the requirements of federal law relating to such traffic, including those related to shared provision of access. Accordingly, the basic rule in this context is that interconnecting local exchange carriers must each rely on their end users for compensation for ISP traffic and may not demand payments from one another.

Indeed, if *any* inter-carrier compensation is warranted under existing federal rules, it is *GNAPs* that must pay *Bell Atlantic* for originating access traffic. As noted, under the federal rule, GNAPS must recover its usage-sensitive network costs (if at all) from its ISP customer. This is true whether GNAPS provides the full access service – as it would if a GNAPS local service subscriber placed a dial-up call exclusively over GNAPS' network to an ISP served by GNAPS – or if Bell Atlantic or another local carrier provides a part of that access service by serving the originating caller. Therefore, if the ESP exemption does not apply to this traffic (as GNAPs appears to claim), then to the extent that GNAPS avoids costs when another carrier serves the calling party, GNAPS should reimburse the originating carrier for part of the amount that it receives under its "local business rate."[5] *Id.* In no event can GNAPS expect to collect twice for the same network functions – first from the ISP under its local business rates and a second time from Bell Atlantic.

III. GNAPs' Tariff Unlawfully Circumvents the Section 251/252 Negotiation, Arbitration, and Enforcement Process Which the Commission Applied To Internet-Bound Traffic.

In the *Reciprocal Compensation Order*, the FCC made clear that, pending the adoption of a uniform federal rule governing inter-carrier compensation for Internet-bound traffic, parties must treat such traffic in accordance with the terms of the interconnection agreements between the parties, as interpreted and enforced by the appropriate state commission. GNAPs' effort to impose inter-carrier compensation obligations unilaterally runs afoul of this determination.

[5] This policy is already reflected in GNAPs' tariff. Because section 7A of the tariff, "ISP Traffic Delivery Service," is inconsistent with federal policy, it cannot be applied to this traffic. However, section 2.21, "Meet Point Billing," is consistent with the Commission's access policy. Under that provision, "[e]ach Exchange Telephone Company will provide the portion of Local Transport to an interconnection point (IP) with another Exchange Telephone Company." Here, the interconnection point is GNAPs' switch. The rate charged under that provision is based upon the relative transport mileage of each carrier, as required by Commission policy. Bell Atlantic transports the traffic from all points in the LATA to a single GNAPs switch. Therefore, Bell Atlantic provides the bulk of the transport and should be reimbursed under GNAPs' tariff.